92-1082

No.

Supreme Court, U.S.
FILED
DEC. 23 1992
CLERK

IN THE
Supreme Court of the United States
OCTOBER TERM, 1992

BLACK AND DECKER, INC.,
Petitioner,

v.

JERRY L. ROSS,
Respondent.

Petition for a Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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PETITION FOR A WRIT OF CERTIORARI

MARK D. GATELY
10 Light Street
Baltimore, Maryland 21202
(410) 727-6464
Counsel for Petitioner

December 23, 1992

WILSON - EPES PRINTING CO., INC. - 789-0096 - WASHINGTON, D.C. 20001

50 pp

QUESTIONS PRESENTED

1. Whether the award of punitive damages in a diversity action against Black & Decker without use of post-verdict review criteria approved by this Court in *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S.Ct. 1032, 1043 (1991), violates Black & Decker's due process rights.

2. Whether the appellate post-verdict review of the punitive damage award violates Black & Decker's Seventh Amendment right to a trial by jury.

PARTIES TO THE PROCEEDINGS

Petitioner Black & Decker (U.S.) Inc., sued herein as Black and Decker, Inc., pursuant to Rule 29.1 of the Rules of this Court, states that it is an indirect wholly-owned subsidiary of Black & Decker, Inc. Black & Decker, Inc. is a wholly-owned subsidiary of The Black & Decker Corporation.

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PETITION FOR A WRIT OF CERTIORARI

Black & Decker (U.S.) Inc. ("Black & Decker"), sued as Black and Decker, Inc., petitions for a writ of certiorari to review the judgment of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit (App., *infra*, 1a-21a) is reported at 977 F.2d 1178 (7th Cir. 1992). The ruling of the United States District Court for the Northern District of Illinois ("District Court"), on petitioner's motion for judgment

notwithstanding the verdict, or in the alternative, for new trial, or in the alternative, for a remittitur, is not reported (App., *infra*, 22a-24a). The order of the United States Court of Appeals for the Seventh Circuit on Black & Decker's petition for rehearing and suggestion, in the alternative, for rehearing in banc (App., *infra*, 25a-26a) is reported at No. 91-2670, 1992 U.S. App. LEXIS 31438 (7th Cir. Dec. 2, 1992).

JURISDICTION

The judgment of the United States Court of Appeals for the Seventh Circuit was entered on October 21, 1992. A petition for rehearing and suggestion, in the alternative, of rehearing in banc was denied on December 2, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. Section 1254.

CONSTITUTIONAL PROVISIONS INVOLVED

The Fifth Amendment to the United States Constitution provides, in relevant part:

> No person shall . . . . be deprived of life, liberty or property, without due process of law . . . .

U.S. Const. amend. V.

The Seventh Amendment to the United States Constitution provides, in relevant part:

> In Suits at common law . . . no fact tried by a jury shall be otherwise re-examined in any Court of the United States . . . .

U.S. Const. amend. VII.

STATEMENT

This Court recently granted certiorari in the case of *TXO Production Corp. v. Alliance Resources Corp.*, 419 S.E.2d 870 (W.Va. 1992), *cert. granted*, 61 U.S.L.W. 3206 (U.S. Nov. 30, 1992) (No. 92-479). Like *TXO*, this case

presents another instance of punitive damages "run wild." *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S.Ct. 1032, 1043 (1991). Unlike *TXO*, however, this case concerns the existing conflict among the federal circuits regarding the application of *Haslip* in federal courts exercising diversity jurisdiction.

The lawsuit began as a products liability action sounding in negligence and strict liability. Jerry L. Ross ("Ross") sought recovery for a serious hand injury incurred while using a Miter Box electric saw Black & Decker designed, manufactured, and sold. The jury awarded $2 million in compensatory damages and $10 million in punitive damages. Although the punitive award exceeded the compensatory award by five-fold, and was rendered without the procedural safeguards deemed essential by this Court in *Haslip*, the United States Court of Appeals for the Seventh Circuit ("Seventh Circuit") affirmed the award of punitive damages subject to a remittitur of $5 million.

In so doing, the Seventh Circuit did not analyze the punitive damage award in accordance with the *Haslip* factors approved by this Court; rather it upheld the propriety of the punitive damage award by reference to state post-verdict review criteria not submitted to the jury through instructions. The state-based criteria utilized by the Seventh Circuit are constitutionally infirm and their use by the Seventh Circuit abridged Black & Decker's right to a trial by jury.

1. In July 1990, respondent filed a products liability action against Black & Decker in Illinois state court for injuries sustained to his left hand while using a Miter Box electric saw marketed by Black & Decker. App., *infra*, 1a. Pursuant to 28 U.S.C. Section 1441(a), Black & Decker removed the action to federal district court based on diversity of citizenship as provided by 28 U.S.C. Section 1332. App., *infra*, 1a-2a.

2. At trial, Ross maintained that the saw was defective and unreasonably dangerous because it lacked a lower right saw blade guard. App., *infra*, 4a-5a. Conflicting evidence was introduced as to whether inclusion of a blade guard would have prevented the injury. App., *infra*, 6a. At the time of sale, the saw conformed to written safety standards enacted by Underwriters Laboratory ("UL"), an independent not-for-profit organization that tests products and formulates industry safety standards. App., *infra*, 21a.[1] The jury found Black & Decker liable for Ross's injury, and awarded $2 million in compensatory damages and $10 million in punitive damages.[2] Black & Decker filed a motion for judgment notwithstanding the verdict or, in the alternative, for new trial. That motion was denied by the District Court. App., *infra*, 24a. The District Court stated only that the amount of the award was not "excessive or unreasonable under the evidence,"

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[1] Over objection, the district court permitted respondent to introduce evidence that in 1982, four years after the sale of the saw at issue, UL issued safety standards requiring a lower right blade guard on saws, and subsequent to 1982, Black & Decker added lower right blade guards to its saws. App., *infra*, 18a. It is Black & Decker's corporate policy only to market products that comply with safety standards enacted by UL. App., *infra*, 18a. Further, the district court, over objection, permitted respondent to offer evidence of two other Miter saw accidents subsequent to Ross's injury. App., *infra*, 11a.

[2] The parties agreed upon the following punitive damage jury instruction that the district court submitted to the jury: "If you find that the defendant's conduct was willful [sic] and wanton and proximately caused injury to the plaintiff, and if you believe that justice and the public good require it, you may, in addition to any damages to which you find the plaintiff entitled, award an amount which will serve to punish the defendant and to deter others from the commission of like offenses. When I use the expression 'willful [sic] and wanton conducted [sic],' I mean a course of action which shows an utter indifference to or conscious disregard for the safety of others." Tr. 451-452. (The page numbers of the trial transcript are referred to as "Tr. ——"; they are not otherwise paginated in the record.)

App., *infra*, 23a, and declined to remit the award. App., *infra*, 20a. In overruling Black & Decker's argument that punitive damages were not supported by the evidence, the District Court wrote that the "clear weight of the evidence also supports a verdict of punitive damages." App., *infra*, 23a.

3. Despite the District Court's failure to conduct a "meaningful individualized assessment" of the punitive damages award as required by *Haslip*, 111 S.Ct. at 1044, the Seventh Circuit affirmed. Without citing *Haslip*, the Seventh Circuit also rejected Black & Decker's argument that punitive damages were not supported by the evidence, App., *infra*, 16a-19a, but agreed that the punitive award was excessive and should be remitted from $10 million to $5 million. App., *infra*, 21a.

In considering the reasonableness of the punitive damage award, the Seventh Circuit stated that while state substantive punitive damage law applies, federal procedure governs the district court's review of the jury award, and appellate review of the district court's decision is conducted under an abuse of discretion standard. App., *infra*, 19a. The Seventh Circuit then limited its analysis of the punitive damage award to three post-verdict review criteria prescribed by *Hazelwood v. Illinois Central Gulf Railroad*, 114 Ill.App.3d 703, 712-14, 450 N.E.2d 1199, 1207 (1983). App., *infra*, 19a-20a.

> Three factors are especially relevant in analyzing the amount of punitive damages awards under Illinois law: '(1) the nature and enormity of the wrong, (2) the financial status of the defendant, and (3) the potential liability of the defendant resulting from multiple claims.' (citation omitted)

App., *infra*, 19a.

Considering only these three enumerated criteria, the Seventh Circuit upheld the award of punitive damages. App., *infra*, 20a. The Seventh Circuit, however, held:

"Nevertheless . . . we conclude that the award of $10,000,000 is excessive and that the district court judge abused his discretion in refusing to modify it." App., *infra*, 20a-21a. The Seventh Circuit reached "this conclusion in part because the saw which injured the plaintiff was not in violation of any UL standards as of the date of its manufacture or its sale to the general public (although it was in violation on the day Ross was injured), and this fact should have been taken into consideration as mitigating somewhat the wrong committed by B & D." App., *infra*, 21a.[3]

REASONS FOR GRANTING THE PETITION

The decision of the Seventh Circuit denies Black & Decker the procedures approved by this Court in *Pacific Mut. Life Ins. Co. v. Haslip*, 111 S.Ct. 1032 (1991) as satisfying due process guarantees; it upholds constitutionally infirm state punitive damages law; and it sanctions a post-verdict review of punitive damages in derogation of Black & Decker's Seventh Amendment rights. The Seventh Circuit's decision is in conflict with other federal circuit court decisions rendered post-*Haslip*. This Court's review, therefore, is necessary to resolve these conflicts among the circuits and to ensure that litigants in federal cases involving diversity jurisdiction are afforded the full panoply of protections mandated by *Haslip*.

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[3] The Seventh Circuit failed to address the effect of the District Court permitting respondent to introduce evidence of two subsequent injuries involving Miter saws. Under Illinois law, post-occurrence evidence is inadmissible on punitive damage liability, and should not have been considered by the jury on that question. *Kemner v. Monsanto Co.*, 217 Ill.App.3d 188, 212, 576 N.E.2d 1146, 1161, *cert. denied*, 142 Ill.2d 655, 584 N.E.2d 130 (1991) ("Post-accident occurrences or injuries involving the same or substantially similar products may not be used to show that a manufacturer acted in conscious disregard of the safety of others and cannot support a claim of punitive damages.") (citing *Bass v. Cincinnati, Inc.*, 180 Ill.App.3d 1076, 1083-84, 536 N.E.2d 831, 835 (1989)).

1. In *Haslip*, this Court unpheld Alabama's scheme for awarding punitive damages against an attack that punitive awards had become the product of unbridled jury discretion in violation of the Due Process Clause. 111 S.Ct. at 1046. Vital to this Court's affirmance are the three levels of safeguards present under Alabama law: (1) jury instructions that limit the discretion granted to juries in determining punitive damages, *id.* at 1044; (2) a post-verdict hearing by the trial court with consideration of specified factors, *id.*; and (3) de novo appellate review by the Alabama Supreme Court with "detailed substantive standards." *Id.* at 1045. In the absence of these case-specific considerations, the relationship between the amounts of punitive and compensatory damages is insufficient, standing alone, to support the rationality required by due process. *Id.* at 1044-45. Unlike the petitioner in *Haslip*, Black & Decker was denied "the full panoply of [such] procedural protections." *Id.* at 1046. The $10 million punitive award was subjected to no "meaningful and adequate review by the trial court." *Id.* at 1044. The Seventh Circuit similarly failed to provide a "definite and meaningful constraint on the discretion of [the] fact finders," *id.* at 1045, and approved the punitive award (subject to the remittitur) without the procedural safeguards afforded by *Haslip*.

a. Under the Alabama scheme approved by this Court in *Haslip*, "trial courts are 'to reflect in the record the reasons for interfering with a jury verdict, or refusing to do so . . . .' Among the factors deemed 'appropriate for the trial court's consideration' are the 'culpability of the defendant's conduct,' the 'desirability of discouraging others from similar conduct,' the 'impact upon the parties,' and 'other factors, such as the impact on innocent third parties.' " *Id.* at 1044 (citations omitted) (quoting *Hammond v. City of Gadsden*, 493 So.2d 1374, 1379 (Ala. 1986)).

In contrast to the approved approach, the District Court denied Black & Decker's post-trial motions without re-

flecting its reasoning. App., *infra*, 22a-24a. The decision by the Seventh Circuit upholds the methodology employed by the District Court in disposing of Black & Decker's post-trial motions on punitive damages.

Such cursory approvals of punitive damage awards by federal courts post-*Haslip* have been held to violate due process. In *American Employers Insurance Co. v. Southern Seeding Services, Inc.*, 931 F.2d 1453 (11th Cir. 1991), where the jury awarded $400,000 in compensatory damages and $750,000 in punitive damages, the court found that the federal district court's post-verdict review of a punitive damage award did not conform to *Haslip* because the trial court denied post-trial motions "without comment." *Id.* at 1458. While recognizing that *Haslip* was litigated in state rather than federal courts, *id.* at 1457, the court neverthless remanded to the district court to enunciate in the record its review of the post-verdict safeguards required by state law and approved in *Haslip*. *Id.* at 1458.

Similarly, in *Robertson Oil Co., Inc. v. Phillips Petroleum Co.*, 930 F.2d 1342 (8th Cir. 1991), a federal district court summarily rejected a defendant's motion to remit a punitive damage award. *Id.* at 1347. Due to the inadequate post-verdict review, and the *Haslip* decision, the court "remand[ed] for the district court to articulate its analysis under Arkansas law and to review the award under the criteria approved in *Haslip* . . . as well as principles enumerated in the Arkansas cases." *Id.* *See also Cole v. Control Data Corp.*, 947 F.2d 313, 320 (8th Cir. 1991) (remanding to federal district court to conduct review "under the standards articulated in *Haslip* . . . applying the appropriate principles of Missouri law."); *Doe by Doe v. B.P.S. Guard Services, Inc.*, 945 F.2d 1422, 1428 (8th Cir. 1991) (remanding case for "consideration of the post trial motion in light of *Haslip* and controlling Missouri authority.").

In each of the foregoing diversity actions, the appellate court reversed an award of punitive damages and remanded to the federal district court to conduct the required post-verdict review mandated by the Due Process Clause and delineated in *Haslip*. By contrast, the Seventh Circuit affirmed the actions of the District Court despite its failure to conduct on the record a meaningful post-verdict review of the punitive award. The absence of a constitutionally sufficient post-verdict review is identical to the records declared deficient by the Eighth and Eleventh Circuits. Review is merited by this Court to resolve the existing conflict among the circuits as to the nature and extent of the post-verdict review required by *Haslip* of federal district courts exercising diversity jurisdiction.

b. Black & Decker was deprived of its due process rights at the appellate level. The Seventh Circuit did not address the District Court's summary rejection of Black & Decker's post-trial punitive damage motions, and in passing, noted that the District Court dismissed Black & Decker's motion to remit a portion of the punitive award. App., *infra*, 20a. The decision of the Seventh Circuit to uphold, rather than overturn, the federal district court's cursory treatment of Black & Decker's post-trial motions is in conflict with the safeguards approved by this Court in *Haslip*, and runs afoul of decisions requiring detailed post-verdict reviews of punitive awards. *See, e.g., Cole*, 947 F.2d at 320; *Doe by Doe*, 945 F.2d at 1428; *American Employers Insurance Co.*, 931 F.2d at 1458; *Robertson Oil Co.*, 930 F.2d at 1347.

Where post-verdict review of a punitive award is absent or insufficient under *Haslip*, an appellate court is required to reverse and remand to the trial court to conduct the constitutionally mandated post-verdict review. Here, however, the Seventh Circuit conducted its own constitutionally infirm post-verdict review, and applied the post-verdict punitive damage criteria set forth by Illinois state law without testing the sufficiency of those criteria against the standards approved in *Haslip*. Had the Sev-

enth Circuit analyzed the adequacy of Illinois punitive damage law post-*Haslip*, it necessarily would have concluded that the law of Illiniois fails to afford litigants the due process protections mandated by *Haslip*.

Post-*Haslip*, federal courts have measured state post-verdict review standards against *Haslip* to ensure that any punitive award is constitutionally grounded. *See, e.g., Johnson v. Hugo's Skateway*, 974 F.2d 1408, 1414-18 (4th Cir. 1992); *Cole*, 947 F.2d at 319-20; *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95, 101-08 (4th Cir. 1991); *Glasscock v. Armstrong Cork Co.*, 946 F.2d 1085, 1095-99 (5th Cir. 1991), *cert. denied*, 112 S.Ct. 1778 (1992); *Union National Bank of Little Rock v. Mosbacher*, 933 F.2d 1440, 1447-48 (8th Cir. 1991), *cert. denied*, 112 S.Ct. 870 (1992); *American Employers Ins. Co.*, 931 F.2d at 1458.

In *Mattison*, for example, the Fourth Circuit ruled that fundamental due process guarantees require that a state punitive damages scheme be measured against *Haslip* to ensure that any such award passes constitutional muster. In reviewing the award of $125,000 in compensatory damages and $100,000 in punitive damages in a diversity action applying South Carolina law, the *Mattison* court recognized:

> The first principle of due process embraces a rule of law which contains standards that can be known in advance, conformed to, and applied rationally. The doctrine of the supremacy of law is 'a doctrine that the sovereign and all its agencies are bound to act upon principles, not according to arbitrary will; are obliged to follow reason instead of being free to follow caprice.'

947 F.2d at 101 (quotation omitted).

In applying this "first principle of due process," the *Mattison* court found that any review of a punitive damage award under state law by a federal court exercising diversity jurisdiction begins with an assessment of the

constitutionality of that law under *Haslip* criteria. *Id.* at 105. The *Mattison* court reasoned that under then applicable South Carolina law,[4] a court could only set aside a punitive award when it was "so shockingly excessive as manifestly to show that the jury was actuated by caprice, passion or prejudice." *Id.* at 100 (citations omitted). Furthermore, the South Carolina punitive damage scheme failed to ensure " 'that punitive damages awards are not grossly out of proportion to the severity of the offense and have some understandable relationship to compensatory damages.' " *Id.* at 104 (quoting *Haslip*, 111 S.Ct. at 1045).

The M*attison* court held that South Carolina law violated the Due Process Clause and afforded no *Haslip* protections. *Id.* at 105. Due to South Carolina's embrace of the "caprice, passion or prejudice" post-verdict review standard questioned by this Court in *Haslip*, 111 S.Ct. at 1045 n.10, and the absence of any requirement that the punitive award bear an "understandable relationship to compensatory damages," *id.* at 1045, the Fourth Circuit found that its "sensibilities about that process [were] offended." *Mattison*, 947 F.2d at 105. For the Fourth Circuit, this lack of a proportionality requirement between compensatory and punitive damages compelled it "to conclude that the scheme violates the *first principle of due process.*" *Id.* (emphasis added).

Like the South Carolina law declared unconstitutional in *Mattison*, Illinois law does not require that punitive damages be proportional to compensatory damages. Rather, Illinois law expressly holds:

> There is no requirement that the amount of punitive damages imposed on a defendant bear any particular proportion to the size of the plaintiff's compensatory award.

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[4] The South Carolina law found constitutionally infirm in *Mattison* was revised to comply with *Haslip* in *Gamble v. Stevenson*, 305 S.C. 104, 406 S.E.2d 350 (1991).

Deal v. Byford, 127 Ill.2d 192, 204, 537 N.E.2d 267, 272 (1989); *Ekl v. Knecht*, 223 Ill.App.3d 234, 243, 585 N.E. 2d 156, 164 (1991). Indeed, Illinois courts have upheld punitive awards having 19:1 and 15:1 ratios to the compensatory awards in *Deal*, 127 Ill.2d at 204, 537 N.E.2d at 272, and *Ekl*, 233 Ill.App.3d at 243, 585 N.E.2d at 164, respectively. Such "wildly unpredictable" awards in the absence of proportionality constraints demonstrate the failure of Illinois law to define adequately a punitive damage scheme that may be rationally applied. *Haslip*, 111 S.Ct. at 1059-60 (O'Connor, J., dissenting).

In addition to rejecting any proportionality requirement, Illinois courts will not disturb a punitive damage award unless the award is the result of "passion, partiality or corruption." *Harriss v. Elliott*, 207 Ill.App.3d 384, 389, 565 N.E.2d 1041, 1044 (1991) (citing *Deal*, 127 Ill.2d at 204, 537 N.E.2d at 272). As this Court suggested, and the Fourth Circuit in *Mattison* confirmed, the "passion, partiality or corruption" standard is constitutionally deficient in the absence of the full panoply of Alabama-style due process protections.[5] The Eighth Circuit, however, in *Lantham Seed Company v. Nickerson Plant Breeders, Inc.*, Nos. 90-2486, 90-2550, 1992 WL 319680 at *7 (8th Cir. Nov. 9, 1992), expressly rejects

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[5] Similarly, state courts post-*Haslip* have struck down state punitive damage law that uses the "passion, partiality, or corruption" standard of review at the trial court level. *See Garnes v. Fleming Landfill, Inc.*, 186 W.Va. 656, 413 S.E.2d 897, 908 (1992). Other state courts have embarked upon similar reviews of state punitive damage standards in light of *Haslip*. *See, e.g., Gamble*, 305 S.C. at 104, 406 S.E.2d at 354 (establishing eight factors for post-trial review of punitive damages); *Alexander & Alexander v. Evander*, 88 Md.App. 672, 720-22, 596 A.2d 687, 711-12 (1991), *cert. denied*, 326 Md. 435, 605 A.2d 137 (1992) (reviewing compliance of Maryland punitive damage low post-*Haslip*). *See also Texas Farmers Insurance Co. v. Soriano*, No. 04-90-00222-CV, 1992 WL 350627 at *15 (Tex.App. Nov. 30, 1992) (Peeples, J., dissenting) ("I think the Texas procedures for reviewing exemplary damage awards—certainly as applied by the majority—do not satisfy *Haslip*.").

the "contention that a 'passion and prejudice' standard of review cannot satisfy constitutional due process requirements after *Haslip*." Likewise, the Fifth Circuit in *Glasscock*, 946 F.2d at 1098, dismisses the "implication that a 'passion and prejudice' standard of review can never withstand constitutional scrutiny after *Haslip*." Given the Seventh Circuit's failure to address the constitutional propriety of the Illinois' "passion, partiality or corruption" post-verdict review standard, and the direct conflict among the Fourth, Fifth and Eighth Circuits interpreting this Court's intimation that this standard is consitutionally suspect in the absence of the full panoply of Alabama-style due process protections, 111 S.Ct. at 1045 n. 10, review is merited to resolve this conflict among the circuits.

2. Additionally, Black & Decker was denied its Seventh Amendment right to a trial by jury at the appellate level. In conducting its review of the punitive award, the Seventh Circuit applied de novo the post-verdict review criteria prescribed in *Hazlewood v. Illinois Central Gulf Railroad*, 114 Ill.App.3d 703, 712-14, 450 N.E.2d 1199, 1207 (1983). These *Hazlewood* factors, however, were not included in the District Court's punitive damage jury instruction. The Seventh Circuit's de novo engrafting of the *Hazelwood* factors onto an already infirm punitive damage post-verdict review violates Black & Decker's Seventh Amendment right to a trial by jury.

It is fundamental that a federal court in a diversity action must apply state substantive law and federal procedural law. *Erie R.R. Co. v. Tompkins*, 304 U.S. 64 (1938). The allocation of fact-finding responsibility between the trial judge and the jury is a procedural matter and, as such, is guided by Seventh Amendment principles. *Byrd v. Blue Ridge Rural Elec. Coop., Inc.*, 356 U.S. 525 (1958). Although a state court in assessing punitive damages may apportion fact-finding respon-

sibilities between judge and jury, *see Mattison*, 947 F.2d at 99 n.1 ("the Seventh Amendment is not binding on the states.") (citing *Hardware Dealer Mut. Fire Ins. Co. v. Glidden Co.*, 284 U.S. 151, 158 (1931); *Pearson v. Yewdall*, 95 U.S. 294, 296 (1877)), in federal court, the jury alone must perform this function. So as not to invade the fact-finding province of the jury, the role of a federal district court reviewing a punitive damage award is to determine whether the verdict is within the confines set by the state law, and to determine by reference to Rule 59, whether a new trial or remittitur should be ordered; appellate review then is conducted under an abuse of discretion standard. *Browning-Ferris Indus. of Vermont, Inc. v. Kelco Disposal, Inc.*, 492 U.S. 257, 279 (1989).

Post-*Haslip*, a district court sitting in diversity must instruct the jury on the totality of the substantive state law of punitive damages, *Cash v. Beltmann North American Co., Inc.*, 900 F.2d 109, 110 (7th Cir. 1990), including post-verdict factual considerations. *Hugo's Skateway*, 974 F.2d at 1416. To protect a litigant's Seventh Amendment rights and to remain faithful to *Erie*, the Fourth Circuit recently held that a federal district court exercising diversity jurisdiction and applying state law must incorporate that state's post-verdict punitive damage review criteria into the jury instruction. *Id.* (citing *Mattison*, 947 F.2d at 108-09). As explained by the Fourth Circuit:

> For example, in *Haslip* the Supreme Court upheld Alabama's scheme, despite jury instructions which gave broad discretion to the jury, in light of the seven-factor review of the punitive damages award by the trial court, in addition to appellate review of the trial court's decision. If the same case were to later arise in federal court in Alabama, *Erie* would require the same factors considered by the court under state law to be considered in assessing punitive damages in

> federal court and, in our view, federal procedure would require that these factors be given to the jury for consideration and be reviewed by the district court under the standards given in Fed. R. Civ. P. 50(b) and 59.

Id. at 1416 n.9. In this fashion, the federal jury remains the sole fact-finder, combining the roles of the state-court jury and judge. And the appellate court, in conducting a post-verdict review of the punitive award, will not usurp the function of the jury by weighing evidence under state-law criteria not submitted to the jury through instructions. *Id.* at 1416; *Mattison*, 947 F.2d at 99. *See also Keenan v. City of Philadelphia*, No. 91-1306, 1922 WL 370033 at *22 n.29 (3rd Cir. Dec. 17, 1992) (Higginbotham, J., dissenting) (citing *Mattison* with approval); *Lightning Lube, Inc. v. Witco Corporation*, No. 87-3243, 1992 WL 212103 at *16-17 (D.N.J. Sept. 2, 1992) (applying *Hugo's Skateway*); *Peoples Bank & Trust Co. of Mountain Home v. Globe Intern., Inc.*, 786 F.Supp. 791, 801 (W.D.Ark. 1992) ("The Seventh Amendment does not permit a federal court to substitute its judgment for that of a jury, as long as the jury operates within the constraints of law and the evidence.") (citing *Mattison*), *aff'd and remanded on other grounds*, 1992 WL 315731 (8th Cir. Nov. 4, 1992).

In direct conflict with the Fourth Circuit, the Seventh Circuit employed constitutionally flawed state post-verdict review criteria that were not submitted to the jury through instructions. Rather than remand to the federal district court for a new trial as in *Hugo's Skateway*, 974 F.2d at 1418, the Seventh Circuit usurped the function of the jury in contravention of Black & Decker's Seventh Amendment rights by making findings of fact pursuant to state-law criteria never considered by the jury.

The Seventh Circuit's ruling implicitly is aligned with the rulings of several other federal circuits holding that

post-verdict appellate review of elements of a punitive damage award not considered by the jury is constitutionally appropriate under the Seventh Amendment. In *Estes v. Time Insurance Company*, No. 91-2809, 1992 WL 353272 at *8 (8th Cir. Dec. 3, 1992), for example, the court expressly rejected the argument that a federal court sitting in diversity is bound by the Seventh Amendment to instruct the jury on the totality of a state's punitive damage scheme. Rather, the court rejected the holding of *Mattison* as a "curious one." *Id.* (citing *Robertson Oil Co., Inc. v. Phillips Petroleum Co.*, No. 91-3717, 1992 WL 333575 (8th Cir. Nov. 18, 1992)). Similarly, the Third Circuit, in rejecting *Mattison*, "agree[s] with the holding in *Glasscock*, 946 F.2d at 1098-99, a diversity case involving Texas law, that federal post-trial review under Rules 50 and 59 and federal appellate review of a jury award provide sufficient constraint on a jury's discretion to satisfy the requirements of due process." *Dunn v. Hovic*, No. 91-3837, 1992 WL 228875 at *15 (3rd Cir. Sept. 18, 1992), *reh'g granted and opinion vacated* (3rd Cir. Oct. 8, 1992). *Cf. Morgan v. Woessner*, 975 F.2d 629, 640 (9th Cir. 1992) (rejecting arguments that *Haslip* changes the mandated *Browning-Ferris* review standard for federal punitive damages claims under 42 U.S.C. Section 1983 but has not considered *Haslip*'s effect on state-based punitive damage claims).

The Seventh Circuit's decision approving the District Court's failure to allow the federal jury to make full findings of fact in accordance with Illinois state law irreconcilably conflicts with the Fourth Circuit's approach as articulated in *Hugo's Skateway*, 974 F.2d at 1416-17. As a result of this circuit conflict, federal courts are left without guidance as to the appropriate manner for reviewing punitive damages awards in diversity actions so as not to violate *Haslip*, *Erie*, and Seventh Amendment guarantees. Review by this Court is merited to resolve this conflict among the federal courts.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted,

MARK D. GATELY
10 Light Street
(410) 727-6464
Baltimore, Maryland 21202
Counsel for Petitioner

December 23, 1992

APPENDICES

APPENDIX A

IN THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

No. 91-2670

JERRY L. ROSS,
Plaintiff-Appellee,

v.

BLACK & DECKER, INCORPORATED, a foreign corporation,
Defendant-Appellant.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 90 C 4439—George M. Marovich, *Judge.*

ARGUED FEBRUARY 20, 1992—DECIDED OCTOBER 21, 1992

Before CUDAHY and COFFEY, *Circuit Judges*, and WOOD, JR., *Senior Circuit Judge.*

COFFEY, *Circuit Judge.* In July 1990, Jerry L. Ross, an Illinois resident, filed a products liability suit in an Illinois state court against the defendant Black & Decker, Inc. ("B & D"), a corporation with its principal place of business in Maryland. Ross sought damages for an injury sustained while operating a power saw manufactured by the defendant. B & D removed the state action to federal district court pursuant to 28 U.S.C. § 1441(a),

invoking the court's diversity jurisdiction. A jury found B & D liable for Ross' injury, and awarded him $2,000,000 in compensatory damages and $10,000,000 in punitive damages. B & D urges reversal of the jury verdict and damages award on numerous grounds. The parties agree that Illinois law is the substantive law governing this case. We affirm the jury's finding of liability against B & D and its award of $2,000,000 in compensatory damages to Ross, and vacate the jury's punitive damages award as excessive.

I. Factual Background

On May 4, 1983, Ross, a brick-layer and part-time handyman, was using a DeWalt 10 inch Power Miter Box electrical saw designed, manufactured and sold by B & D, to cut a piece of wood for window trim. Ross had placed the lumber on the floor to make a right-handed 45 degree cut. Ross used his right hand to operate the saw's trigger handle while holding the piece of wood with his left hand. A stationary metal enclosure prevented inadvertent contact with the upper portion of the saw blade. A clear plastic guard extending down along and parallel to the left side of the saw prevented contact with the blade on the left side position, and moved upward when it came in contact with the wood. The lower right side of the saw blade was barren of any such safety device. Because the saw had its own base on which to place the wood to be cut, it could be used on the floor as well as on a table. The saw could also be operated with either hand on the trigger handle while using the other hand to secure the workpiece.

After Ross finished making his cut, he released the saw's power trigger with his right and reached for the piece of wood with his left hand. He testified that as he "started to get up, my [left] hand rolled, I guess, or drifted into the blade." According to Dr. Eloff Eriksson, the plastic surgeon who later operated on Ross, the contact with the still-rotating blades "almost completely

severed [Ross' left] hand from the forearm at the level of the wrist." Only a narrow "skin bridge" and three tendons remained connecting the forearm to the hand. Dr. Eriksson stated that "all function in the hand [was] lost and the hand was dangling on that strip of skin and three tendons. . . . Functionally, this injury was essentially the same as a complete amputation because the majority of the structures were divided . . . ." Dr. Eriksson realigned the bones in Ross' injured hand by driving pins through the bones and into the forearm, and surgically repaired the severed tendons. With the use of microsurgical instruments he was able to re-attach and re-activate the severed blood vessels and nerves. A nerve from Ross' lower leg was removed and grafted into a missing gap in the median nerve of his left hand. After surgery, Ross underwent a course of rehabilitation therapy which lasted more than a year.

An expert witness for the plaintiff, Dr. Hatem Galal, a plastic surgeon who examined Ross' injured hand and conducted an occupational therapy evaluation of Ross' hand function for employment purposes, testified that Ross lost about 60% of the functioning of his left hand because of the saw accident and stated that a human hand accounts for about 90% of the function of an arm. An arm accounts for about 60% of the body's total function.[1] Therefore, Dr. Galal estimated that Ross' hand injury deprived him of about 30% of total body functioning. Ross testified that he is unable to return to work as a brick-layer because of the injury.

II. Post-trial Motions

B & D challenges the district court's denial of its post-trial motions for judgment notwithstanding the verdict ("JNOV") pursuant to Fed. R. Civ. P. 50(b) and for a

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[1] These percentages correspond with statistics from the American Medical Association's Guides to the Evaluation of Permanent Impairment at 16 (3rd Ed. 1990).

new trial pursuant to Fed. R. Civ. P. 59. "In diversity cases, state law governs the standard of review of a denial of a motion for judgment notwithstanding the verdict." *Bilski v. Scientific Atlanta*, 964 F.2d 697, 699 n.2 (7th Cir. 1992) (citation omitted); *see also Arcor, Inc. v. Textron, Inc.*, 960 F.2d 710, 714 (7th Cir. 1992). "In a diversity action governed by Illinois law, judgment notwithstanding the verdict is appropriate only in those cases in which all of the evidence, when viewed in the light most favorable to the opponent, so overwhelmingly favors movant that no contrary verdict based on that evidence could ever stand." *Bilski*, 964 F.2d at 699 (citations omitted); *Arcor*, 960 F.2d at 714. We review denials of JNOV motions *de novo*. *Fleming v. County of Kane*, 898 F.2d 553, 559 (7th Cir. 1990).

Federal law governs the review of a motion for a new trial, even in diversity cases. *Hardin, Rodriguez & Boivin Anesthesiologists v. Paradigm Insurance Company*, 962 F.2d 628, 640 (7th Cir. 1992). A new trial may be granted only if the jury's verdict is against the clear weight of the evidence. *Id.* We review a denial of a motion for a new trial under the deferential abuse of discretion standard. *Id.*; *Bilski*, 964 F.2d at 700.

With these standards of review in mind, we turn to the substantive law governing Ross' claim. In Illinois, to prevail in a product liability action, a plaintiff must demonstrate that (1) his injury resulted from the condition of the product; (2) the condition of the product was unreasonably dangerous; (3) the condition existed when it left the seller's control; and (4) the condition was the proximate cause of the injury. *Bilski*, 964 F.2d at 699 (citing *Pierce v. Hobart Corp.*, 512 N.E.2d 14, 16 (1987)); *see also Aetna Insurance Co. v. Amilio Brothers Meat Co.*, 538 N.E.2d 707 (Ill. App. 1989).

At trial, Ross argued that the B & D saw, as designed, manufactured and sold, was unreasonably dangerous because it lacked a necessary lower right side saw blade

guard. On appeal, B & D makes one argument in support of its JNOV and new trial motions; that Ross failed to present any evidence supporting his theory that a right lower blade guard would have prevented his injury. B & D's trial strategy, which they now restate on appeal, was to argue that Ross' hand contacted the blade from *below*, and therefore a *side* right guard would not have prevented the injury. In partial support of its theory, B & D points out that Ross was unable to recollect precisely how his hand came in contact with the saw blade. Ross remembered only releasing the saw's power button, reaching with his left hand for the piece of cut lumber to the right of the saw, and his hand somehow "drift[ing]" into the blade. B & D also points to the testimony of John L. Bennett, a retired 40-year employee of B & D who last served with the company as a safety assurance manager. In this capacity, one of Bennett's functions was to serve as an expert witness for B & D. According to Bennett, a lower right guard on the saw would not have prevented Ross' injury because Ross came into contact with the saw from below, and the guard would only have prevented contact with the saw from the side. Bennett came to this conclusion based upon his analysis of photographs of Ross' injured hand, and from his inspection of the saw's mechanism.

The plaintiff disputed the deefndant's explanation for the injury, and argued that his left hand contacted the blade laterally from the right side of the saw and thus a lower-right blade guard would have prevented the injury. In support of his position, the plaintiff directs us to the testimony of Dr. Eriksson, who agreed that Ross' injury was consistent "with contact with a rotating saw blade with the thumb in an upward position and thereafter a rotation of the arm consistent with the grabbing of the saw blade resulting in the almost complete amputation, leaving only the skin bridge on top of the wrist". This factual scenario describes Ross' contact wth the saw blade from the right side of the machine, rather than from under the saw. Donald L. Clark, a mechanical engi-

neer formerly employed by B & D and one of the holders of the patent for the power miter saw which injured Ross, stated that he believed Ross' "left hand moved sideways into the still spinning blade." Another of the plaintiff's expert witnesses was Stanley R. Kalin, a safety engineer and former deputy chief of the office of training and development at the Department of Labor's Occupational Safety and Health Administration in Washington, D.C. Kalin explained that safety engineers specialize in "examining accidents and examining machines and processes and products to determine whether there is an unreasonable danger in the machine or in the process." In Kalin's opinion, the saw used by Ross "was defective and unreasonably dangerous due to the lack of a complete guard on the right-hand side of the blade" and that "the presence of a proper guard on the right-hand side of the blade would have prevented the injury to Mr. Ross."

The jury was thus presented with conflicting testimony as to how Ross' left hand came in contact with the blade. The defendant's witnesses maintained that contact was from below and therefore a right side guard would not have prevented the injury. The plaintiff's witnesses testified that the hand contacted the saw laterally and that a side guard would have spared Ross the injury. Given this conflicting testimony, the district court properly denied the defendant's motions for JNOV and for a new trial. B & D has merely demonstrated that the defendant's and plaintiff's experts disagreed about the way in which Ross suffered the serious and crippling injury to his left hand. The jury chose to believe the plaintiff's witnesses. As such, B & D has not met the standard required for a JNOV: that when viewing *the evidence in the light most favorable to Ross*, the evidence so overwhelmingly supported B & D's position that the liability verdict against B & D cannot stand. *See Bilski*, 964 F.2d at 699. Nor has B & D met the standard for a new trial: it has failed to demonstrate that the district court abused its discretion in concluding that the verdict was against

the clear weight of the evidence. *See Harding*, 962 F.2d at 640. The defendant's JNOV and new trial motions were properly denied.

III.

B & D argues that the district court comitted several evidentiary errors which require reversal of the jury verdict. "Even in diversity cases the rules of evidence applied in federal courts are the federal rules of evidence rather than state rules . . ., save with respect to matters of presumptions, privilege, and competency of witnesses, Fed. R. Evid. 302, 501, 601, none of which is involved here." *Barron v. Ford Motor Company of Canada*, 965 F.2d 195, 198-99 (7th Cir. 1992). We note that the Illinois Supreme Court has selectively adopted a large number of the Federal Rules of Evidence by decision and court rule. Michael H. Graham, *Cleary & Graham's Handbook of Illinois Evidence* xxxii (5th ed. 1990). The appellant carries a heavy burden in challenging a trial court's evidentiary rulings on appeal because a reviewing court gives special deference to the evidentiary rulings of the trial court. *Wheeler v. Sims*, 951 F.2d 796, 801-02 (7th Cir. 1992), *cert. denied*, 1992 WL 130799 (U.S. October 13, 1992) (citation omitted). We will reverse such rulings only upon a showing that the trial court committed an abuse of discretion. *Id.* at 802. Moreover,

> "[u]nder the abuse of discretion standard of review, the relevant inquiry is not how the reviewing judges would have ruled if they had been considering the case in the first place. . . . Rather, the abuse of discretion standard is met only when the trial judge's decision is based on an erroneous conclusion of law or where the record contains no evidence on which he rationally could have based that decision, or where the supposed facts found are clearly erroneous."

Id. Our review is limited under Fed. R. Civ. P. 61 to whether an "error in either the admission or the exclu-

sion of evidence was made which affected the substantial rights" of the defendant. *Nachtsheim v. Beech Aircraft Corp.*, 847 F.2d 1261, 1266 (7th Cir. 1988). With this highly deferential standard of review in mind, we turn to the specific court rulings challenged by the defendant.

A.

B & D argues that the district court abused its discretion when it permitted Ross to introduce evidence concerning an Underwriters Laboratory ("UL") safety standard, made effective in 1982, which required a lower right blade guard on power saws such as the one involved in the instant case. UL is an independent, not-for-profit organization which tests products and formulates safety standards which it then publishes. "Under both federal and Illinois law, compliance with applicable federal [safety] standards is relevant, though not conclusive, in a products liability case." *Schwartz v. American Honda Motor Company*, 710 F.2d 378, 383 (7th Cir. 1983). Moreover, we note that under Illinois law, "evidence of standards may be relevant and admissible even though the standards have not been imposed by statute or promulgated by a regulatory body and therefore do not have the force of law." *Ruffiner v. Material Service Corporation*, 506 N.E.2d 581, 584 (Ill. 1987). In product liability actions such as the instant one, standards may be relevant in determining whether or not the condition of the product is unreasonably dangerous. *Id.*

Nevertheless, B & D maintains that the UL safety standard should not have been admitted into evidence because it became effective after the saw was manufactured. In support of this argument, B & D relies principally on an Illinois case, *Murphy v. Messerschmidt*, 368 N.E.2d 1299 (Ill. 1977). In *Murphy*, the Illinois Supreme Court considered the admissibility of a building code adopted by a city ordinance in 1963 in a case involving the safety of an apartment building's steps which were

constructed in 1952. *Id.* at 1302. The court ruled that the building code was inadmissible because it was not "relevant in terms of both time and conduct involved." *Id.* B & D maintains that *Murphy* established a blanket rule that safety standards adopted after the manufacture of a product are not admissible in product liability actions. We disagree. *Murphy* itself acknowledged that there were instances in which post-manufacture safety standards were relevant, for example when the plaintiff could show that a safety regulation was "designed to eliminate existing hazards as well as to prevent the creation of future ones." *Id.* Moreover, as the district court noted, *Murphy* was not a products liability case, but a negligence case. The focus in a products liability case, the district court pointed out, is on the "unreasonable dangerousness of the product. We are dealing with the relevancy of subsequent standards on the issue of 'unreasonably dangerous.' The fact that the standards were promulgated subsequent to manufacture goes to the weight and not to admissibility." We agree with the district court's reasoning, and refuse to hold that the court abused its discretion in admitting in evidence the 1982 UL safety standard as evidence of whether the power saw was unreasonably dangerous when manufactured. *See also Jones v. Black & Decker Manufacturing Company*, 559 N.E.2d 1004, 1005 (Ill. App. 1990) (in a wrongful death/products liability action, federal mining regulations which became effective after the manufacture of a wrench were relevant to the question whether the wrench was unreasonably dangerous); *Seward v. Griffen*, 452 N.E.2d 558, 568 (Ill. App. 1988) (federal safety standards which became effective after the manufacture of a van were relevant to the question whether the van was unreasonably dangerous).

B.

B & D also argues that the district court erred in allowing evidence that B & D added a right lower blade guard to its saw once UL safety standards required it. Fed. R. Evid. 407 provides that:

> "[w]hen, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if controverted, or impeachment."

Thus, under Rule 407, post-manufacture remedial measures are admissible if the manufacturer disputes the feasibility of the remedial measures. *Probus v. K-Mart, Inc.*, 794 F.2d 1207, 1210 (7th Cir. 1986); *Flaminio v. Honda Motor Company*, 733 F.2d 463, 468 (7th Cir. 1984). B & D claims it admitted the feasibility of the remedial measures it later took. It did not. The alleged "admission" occurred during adverse examination by the plaintiff of the defendant's expert *after* evidence of the subsequent remedial measure had been introduced by the plaintiff. B & D claims that it did not have an opportunity to admit feasibility until it presented its case, but we reject this argument. The defendant could have stipulated to the feasibility, or included the admission as an uncontested fact in the pretrial memorandum submitted by the parties, or in a pretrial motion accompanying the submission of the memorandum. It did not, nor did it make any objection when the district court ruled that the post-remedial measures would be admitted because the defendant contested feasibility. Because B & D made what has evolved into a tactical trial error by not stipulating to feasibility, this ruling was proper.

C.

B & D also argues that the district court erred in allowing Ross to introduce evidence of two other accidents involving the defendant's power saw which occurred after Ross' accident. "Evidence of other accidents in products liability cases is relevant to show notice to the defendant of the danger, to show existence of the danger, and to show the cause of the accident." *Nachtsheim*, 847 F.2d at 1268. "However, before such evidence will be admitted, the proponent must show that the other accidents occurred under *substantially similar circumstances.*" *Id.* The admission of such evidence lies within the sound discretion of the trial judge. *Id.* at 1269. We have reviewed the testimony relating to these two accidents and conclude that the circumstances surrounding the accidents were substantially similar to Ross'. Both involved hand injuries sustained while using the B & D power miter saw model involved in the instant case. We agree with the district court's ruling that Ross established that the other accidents were sufficiently similar to his to qualify for admission. B & D also argues, without citation to any authority, that evidence of the two accidents should have been excluded because they occurred after Ross' injury. We reject this argument as well. The fact that the accidents occured after Ross' injury does not make evidence concerning them any less probative of the unreasonably dangerous design and condition of the saw or of the cause of the accident. *Nachtsheim*, 847 F.2d at 1268.

IV.

B & D argues that the district court erred in quashing the discovery deposition of Robert Ruth, a former B & D employee who supervised the design of the power saw prototype for mass production. "Our standard of review for the district court's decision not to allow additional pretrial discovery is abuse of discretion." *Olive Can Co., Inc. v. Martin*, 906 F.2d 1147, 1152 (7th Cir. 1990).

Only six days before the trial was scheduled to begin and two months after discovery had been closed, B & D sent a notice to Ross of its intention to depose Ruth. The deposition was scheduled to be held in Pennsylvania because Ruth was suffering from cancer and was unable to travel to Chicago from his home in Pennsylvania. The defendant asserted that Ruth would contradict the expected testimony of Clark, the former B & D mechanical engineer who headed the team of engineers designing the saw. Clark would testify that he advised Ruth, his superior at B & D, of the need for a lower right blade guard, but Ruth refused to allow him sufficient time to design a guard which would not reduce the saw's versatility.

The district court quashed the notice of deposition of Ruth. The court explained its decision in its order denying the defendant's post-trial motion:

> "defendant contends that it was unaware of the whereabouts of Robert Ruth until a few days before trial and that the court therefore should have permitted defendant to take his evidence deposition for use during trial. Robert Ruth was no stranger to defendant. He had been a high-level Black and Decker employee. He was on the patent for the power miter box saw at issue in this case. He was a retiree of the company to whom Black & Decker was presumably sending retirement checks. He was mentioned in the deposition of plaintiff's safety expert, Mr. Clark, at least 60 days before trial. The court believes that it is much more likely that . . . defendant felt that Mr. Ruth was not needed as a witness. Defendant's contention that Ruth's whereabouts were unknown to Black and Decker until a few days before trial is incredible. The court stands by its refusal to let defendant take Mr. Ruth's evidence deposition a few days before trial."

After the court's refusal to allow the evidence deposition of Ruth, B & D informed the court that it could arrange

to have Ruth's testimony broadcast live during trial over closed circuit television in a location a few blocks from the courthouse. This would have involved moving the trial to an undisclosed location in order to watch Ruth's testimony. In its ruling from the bench rejecting this proposal, the court stated, "I think by doing it this way [through closed circuit television at the undisclosed location] and highlighting his testimony would be awarding [B & D] for its lack of diligence, and it would be prejudicing the plaintiff . . . ."

The district court did not err in quashing Ruth's discovery deposition or in refusing to allow his testimony via closed circuit television at a location removed from the courthouse. As the district court explained, the defendant's attorney created the problem through his lack of diligence in failing to obtain Ruth's deposition in a timely fashion. Ruth was obviously well-known to the defendant and its attorney. The failure to obtain Ruth's deposition in a timely manner should not have been rewarded by allowing Ruth to deliver his testimony through closed-circuit television at a location removed from the scene of the trial. The district court did not abuse its discretion in quashing Ruth's discovery deposition or in refusing to make extraordinary special arrangements for his testimony.

V.

B & D objects to the district court's decision to allow the plaintiff to read excerpts of the testimony of a B & D employee, William F. Saffell, from another trial. Under Fed. R. Evid. 804(b)(1), if a witness is unavailable, his testimony "given as a witness at another hearing of . . . a different proceeding" may be admitted "if the party against whom the testimony is now offered, or, in a civil action or proceeding, a predecessor in interest, had an opportunity and similar motive to develop the testimony by direct, cross or redirect examination."

B & D objected to the proposed Saffell testimony as cumulative and refused to produce its employee. Ross asserts that Saffell was not subject to the court's subpoena power because he resided outside the state of Illinois, and B & D does not contest that assertion. Ross therefore moved for permission to read Saffell's testimony from another trial to the jury, and the district court granted the motion. B & D objected, arguing that it would have produced the witness had the trial court so ordered.

B & D claims that the district court erred because it was unable to object to the testimony read by Ross' counsel and was thus prevented from "providing a full background and explanation of the circumstances surrounding [Saffell's] testimony, or from offering rebuttal testimony." We reject this contention. B & D could have called Saffell, a B & D employee, as its own witness in order to make any point about, or contradict or put into question, any of the testimony that had been read by Ross' counsel. It did not, and cannot now be heard to claim that the district court's decision to allow the testimony was reversible error.

VI.

B & D also argues that the jury verdict should be reversed because the trial judge acted as an advocate for the plaintiff when he sought to clarify a witness' testimony. The argument is preposterous. Under Fed. R. Evid. 614(b), a district court may interrogate a witness. The advisory notes to this provision state that a judge abuses his authority to question a witness when "the judge abandons his proper role, and assumes that of an advocate . . . ." The alleged impermissible conduct by the trial judge occurred during B & D's cross examination of its former employee Clark. B & D attempted to introduce as evidence a portion of Clark's deposition testimony which it alleges impeached the witness. In his deposition, read by B & D's attorney at trial, Clark recalled his former super-

visor Ruth saying that if the guard was not developed "in the neighborhood of four weeks" "we were going to stop development and release it and go into production without the lower right side blade guard." Apparently, B & D was attempting to demonstrate that this conversation could not have taken place because Ruth had left the company the year before the saw went into mass production. B & D argues, that according to Clark's deposition testimony, the saw went into mass production immediately after the four-week period Clark was given to re-design the product. However, the deposition transcript reflects that Clark merely stated that the product would be "release[d]" to go into production, not that production would begin immediately. Clark's trial testimony demonstrates that his recollection was that the process culminating in mass production would begin at the end of the four-week period, not mass production itself. When B & D's counsel asked him "[s]o what I'm trying to determine, sir, in that four-week period when it ended, culminated in mass production, in the real production run?", Clark answered, "[i]t allowed it to progress so that we did *eventually end up with mass production. There was a lot of other steps that had to be made.*" (emphasis added).

Ross' counsel objected to B & D's attempt to impeach. The district court indicated its agreement with Ross' objection, and then sought a clarification of Clark's testimony. The district court asked the witness, "[t]he inference isn't that he [Ruth] said that, okay, you got until June the 1st of 1974 to do this and on July the 1st of 1974 you start mass producing that thing. That was not the case, was it, sir?" The witness agreed with the court's characterization of his testimony.

A trial judge may not advocate on behalf of a plaintiff or a defendant, nor may he betray even a hint of favoritism toward either side. This scrupulous impartiality is not inconsistent with asking a question of a witness in an effort to make the testimony crystal clear for the jury.

The trial judge need not sit on the bench like a mummy when his intervention would serve to clarify an issue for the jurors. The brief, impartial questioning of the witness by the judge, as the record reflects, to make the witness' testimony clearer was entirely proper, and B & D's assertion that the judge assumed the role of an advocate in this exchange is without merit.

VII. Punitive Damages

B & D also challenges the jury's award of punitive damages, arguing that they should not have been allowed and, in the alternative, that the jury's award of $10,000,000 in punitive damages was excessive. We will address each argument separately.

A.

In a diversity action, state law determines whether punitive damages are appropriate. *West v. Western Casualty and Surety Company*, 846 F.2d 387, 398 (7th Cir. 1988). Under Illinois law, "whether the circumstances in a particular case may justify an award of punitive damages is a question of law." *J.I. Case Co. v. McCartin-McAuliffe Plumbing & Heating, Inc.*, 516 N.E.2d 260, 263 (Ill. 1987). In Illinois, punitive damages may be awarded when the defendant acted "with fraud, actual malice, deliberate violence or oppression, or when the defendant act[ed] willfully, or with such gross negligence as to indicate a wanton disregard for the rights of others". *Id.*; *Loitz v. Remington Arms Company, Inc.*, 563 N.E.2d 397, 402 (Ill. 1990) (citation omitted). "A defendant is guilty of willful and wanton conduct when he demonstrates knowledge that his conduct poses an increased risk of serious physical harm to another." *Huelemann v. Berkowitz*, 568 N.E.2d 1373, 1378 (Ill. App. 1991). In the product liability context, punitive damages are appropriate if "the manufacturer's conduct evinced a flagrant disregard for public safety." *J.I. Case*, 516 N.E.2d at 263. *See also Wangen v. Ford Motor Co.*, 294 N.W.2d 437, 467 (Wis.

1980) (Coffey, J., dissenting) (punitive damages are reserved for torts which "are malicious, outrageous or a wanton disregard of personal rights which require the added sanction of a punitive damage to deter others from committing acts against human dignity") (applying Wisconsin law) (citation omitted).

Ross argues that he demonstrated at trial that B & D's decision to manufacture and sell its saw without a lower right blade guard was in flagrant disregard of the safety of the public. Ross stresses the testimony of Clark, the former B & D mechanical engineer who oversaw the design and development of the prototype for the miter box saw. Clark testified that B & D knew that potential users of the saw were just as likely to secure a piece of lumber by placing their hand on the right as well as the left side of the saw's blade, thus making blade guards necessary on both the right and left sides of the lower blade. However, according to Clark, B & D officials refused to install a right lower blade guard in the saw's design because it would have limited the saw's ability to make certain kinds of cuts, thus diminishing the product's versatility and marketability. Clark testified that he had warned against producing the saw without the right lower blade guard, but was given too short a period of time to re-design the saw.[2] Clark stated that had he "been given enough time, I'm certain I could have come up" with a guard that would have protected its user and not diminished the saw's versatility. Impatient B & D officials, however, ordered him to proceed with the saw's development without the right lower blade guard. Clark described the saw that B & D eventually manufactured and sold as "unsafe and unreasonably dangerous" because of the lack of the lower right blade guard.

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[2] The purpose of this attempted redesign was to create a right lower blade guard that would not diminish the saw's versatility.

Ross also cites B & D's correspondence with UL[3] concerning the saw which injured Ross as further evidence that the defendant acted with flagrant disregard for the safety of the public. B & D policy requires that all its products meet UL standards. In July 1978, when the B & D saw which injured Ross was manufactured, no UL standards were in place that dealt specifically with power miter saws. In October, 1979, however, UL circulated to the manufacturers of power miter saws a proposed new standard requiring right and left lower guards. During the next fourteen months, B & D officials corresponded with UL officials in an attempt to persuade them that a lower right blade saw guard was not necessary. In an October 14, 1980 letter, for example, B & D officials argued that the saw's motor blocked visibility from the right side, making it unlikely that a user would attempt to secure the workpiece from the right side of the blade. UL officials responded that, based on their tests of the product, the motor did not sufficiently block visibility to prevent a user from attempting such cuts. In 1982, UL officially adopted the requirement of a lower right side blade guard. Soon after, B & D, in accordance with its policy of adhering to UL standards, was manufacturing its power miter saws with the lower right guard. Ross maintains that this correspondence with UL provides further evidence that B & D knew or had reason to know that its saw was unreasonably dangerous but resisted adding the lower right guard until it was in violation of UL's published standards. Since products that do not meet UL standards are at a competitive disadvantage, Ross maintains that the delay in B & D's re-design of the saw demonstrates that it was concerned with profits only, and not safety.

From our review of the record we are of the opinion that the Clark testimony and the UL correspondence were

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[3] As we noted above, UL is an independent organization which promulgates product safety standards.

sufficient to support a judgment that B & D's conduct evinced a flagrant disregard for public safety; thus the jury's award of punitive damages was proper. *J.I. Case*, 516 N.E.2d at 263. Despite internal warnings from Clark about the unreasonably dangerous condition of their saw, B & D officials decided to push ahead with production without a lower right blade guard and refused to grant Clark sufficient time to develop a versatile *and* safe design. B & D continued to manufacture the saw without the right blade guard in the face of the obvious view of the UL safety experts that a lower blade guard on the right side was needed. "Where punitive damages may be assessed, they are allowed in the nature of punishment and as a warning and example to deter the defendant and others from committing like offenses in the future." *Loitz*, 563 N.E.2d at 402. An award of punitive damages in the instant case would properly serve such a deterrent purpose.

B.

B & D argues in the alternative that the $10,000,000 punitive damages award was excessive and asks this court to lower the level of punitive damages by ordering a remittitur. In a diversity action, "the factors a jury may consider in determining the amount of punitive damages are governed by state law." *Cash v. Beltmann North American Company, Inc.*, 900 F.2d 109, 110 (1990). Federal law, however, governs, the district court's review of the jury award and appellate review of the district court's decision. *Id.* We will review the district court's determination on the issue of the size of the jury verdict under an abuse of discretion standard. *Id.* When the district fails to apply the appropriate factors to exercise its discretion, an abuse of discretion can occur. *Id.* Three factors are especially relevant in analyzing the amount of punitive damages awards under Illinois law: "(1) the nature and enormity of the wrong, (2) the financial status of the defendant, and (3) the potential liability of the defendant resulting from multiple claims." *Hardin*, 962

F.2d at 640 (citing *Hazelwood v. Illinois Cent. Gulf R.R.*, 460 N.E.2d 1199, 1207-08 (1983)); *see also West*, 846 F.2d at 399. These three factors "are not, however, exhaustive. It is vital that each case be carefully assessed in light of the specific facts involved, and the ultimate determination should be governed by the circumstances of each particular case. Moreover, the underlying purpose of an award of punitive damages must be satisfied." *Deal v. Byford*, 537 N.E.2d 267, 272 (Ill. 1989). That purpose is "to punish the wrongdoer and to deter that party, and others from committing similar acts in the future. . . . Because of their penal nature, punitive damages are not favored in the law, and courts must be cautious in seeing that they are not improperly or unwisely awarded." *Id.*

The district court denied B & D's post-trial motion to remit a portion of the punitive damages award by stating that the award was not "excessive or unreasonable under the evidence." The district court provided no further explanation of its reasoning. In reviewing the district court's decision, we begin by analyzing the punitive damages award under the three factors set out by the Illinois Supreme Court in *Hazelwood*, 450 N.E.2d at 1207-08. As to the nature and enormity of the wrong, B & D's refusal to modify its design in the face of Clark's internal warnings and UL's proposed safety standard is the sort of behavior by a manufacturer that justifies a jury's imposition of an award of punitive damages. As to B & D's financial status, Ross introduced evidence that as of December 31, 1990, B & D had a net worth of $1,933,608,000 and that the company turned $51,095,000 in profits in 1990 from the sale of power tools. As to the third factor, B & D makes no claim that it may be subject to potential liability from multiple claims.

Nevertheless, focusing as we must on the particular circumstances of this case and keeping in mind that the purpose of punitive damages is to punish and deter, we conclude that the award of $10,000,000 is excessive and

that the district court judge abused his discretion in refusing to modify it. We reach this conclusion in part because the saw which injured the plaintiff was not in violation of any UL standards as of the date of its manufacture or its sale to the general public (although it was in violation on the day Ross was injured), and this fact should have been taken into consideration as mitigating somewhat the wrong committed by B & D. Moreover, because punitive damages are not favored in the law, we must ensure that their award serves the purposes for which they are designed. An award of $5,000,000, representing roughly ten percent of B & D's 1990 power tool profits, is sufficient to serve the twin purposes of punishment and deterrence. Under the factual situation set forth herein, that amount is sufficient to dissuade B & D from behaving in a like manner again and puts a sufficient dent in its profits to serve as a fitting punishment. We have the same power to issue a remittitur as the trial court, *Cash*, 900 F.2d at 112, and therefore, in addition to AFFIRMING the jury's finding of liability against the defendant and its award of $2,000,000 in compensatory damages, we VACATE the jury's award of punitive damages, and REMAND the case to the district court with directions to enter an order for a new trial on the issue of punitive damages, unless the plaintiff Ross accepts a remittitur of the punitive damages to $5,000,000.

REMANDED FOR FURTHER PROCEEDINGS CONSISTENT WITH THIS OPINION.

A true Copy:

Teste:

Clerk of the United States Court of Appeals for the Seventh Circuit

APPENDIX B

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT
ILLINOIS, EASTERN DIVISION

No. 90 C 4439

ROSS

v.

BLACK AND DECKER, INC.

[June 17, 1991]

ORDER

This products liability case was tried before a jury which returned a verdict in plaintiff's favor in the amount of $2,000,000 in compensatory damages and $10,000,000 in punitive damages. This court entered judgment on that verdict. Before the court are defendant Black and Decker's motions for a judgment notwithstanding the verdict and, in the alternative, for a new trial.

Fed. R. Civ. P. 50(b) provides in relevant part:

> Not later than 10 days after entry of judgment, a party who has moved for a directed verdict may move to have to verdict and any judgment entered thereon set aside and to have judgment entered in accordance with the party's motion for a directed verdict. . .

Fed. R. Civ. P. 59(a)(1) provides in relevant part: "A new trial may be granted . . . on all or part of the issues [heard by a jury] for any of the reasons for which new trial have heretofore been granted in actions at law. . ."

In diversity cases, the disposition of a JNOV motion is governed by state law. *F. W. Hempel & Co. v. Metal World, Inc.*, 721 F.2d 610, 613 (7th Cir. 1983). Under Illinois law, a JNOV motion should be granted "only in those cases, in which all of the evidence, when viewed in its aspect most favorable to the opponent, so overwhelmingly favors [the] movant that no contrary verdict based on that evidence could ever stand." *Pedrick v. Peoria & Eastern Railroad Co.*, 37 Ill. 2d 494, 229 N.E.2d 504, 513-514 (1967). The standard for granting a new trial motion is that the jury's verdict "is against the clear weight of the evidence." *First National Bank of Kenosha v. United States*, 763 F.2d 891, 896 (7th Cir. 1985).

Defendant's trial strategy was to make this a single issue case. It was defendant's contention that the plaintiff brought his hand straight up underneath into the blade of its power miter box saw and thus, that plaintiff's injury would not have been prevented by a right lower blade guard. Both sides presented evidence on this issue and the plaintiff prevailed. The court finds that the jury's conclusion on this issue, far from being against the clear weight of the evidence (much less a verdict which cannot stand on the basis of all the evidence), is very well-founded in the evidence.

The clear weight of the evidence established that defendant's power miter box saw was unreasonably dangerous and unsafe when put to a reasonable and foreseeable use when considering its nature and function. The clear weight of the evidence also established that the power miter box saw was the proximate cause of the plaintiff's injuries. The clear weight of the evidence also supports a verdict of punitive damages. Neither the verdict of the jury as to general damages or punitive damages are excessive or unreasonable under the evidence.

With respect to the numerous arguments made by defendant to the contrary, the court deems them all to be

meritless and, with one exception, worthy of no further discussion. Defendant contends that it was unaware of the whereabouts of Robert Ruth until a few days before trial and that the court therefore should have permitted defendant to take his evidence deposition for use during trial. Robert Ruth was no stranger to defendant. He had been a high-level Black and Decker employee. He was on the patent for the power miter box saw at issue in this case. He was a retiree of the company to whom Black & Decker was presumably sending retirement checks. He was mentioned in the deposition of plaintiff's safety expert, Mr. Clark, at least 60 days before trial. The court believes that it is much more likely that, given its plaintiff stuck-his-hand-under-the-blade defense, defendant felt that Mr. Ruth was not needed as a witness. Defendant's contention that Ruth's whereabouts were unknown to Black and Decker until a few days before trial is incredible. The court stands by its refusal to let defendant take Mr. Ruth's evidence deposition a few days before trial.

Defendant's motions for a judgment notwithstanding the verdict and for a new trial are denied.

/s/ George M. Marovich
GEORGE M. MAROVICH
Judge

APPENDIX C

UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT
Chicago, Illinois 60604

December 2, 1992

Before

Hon. RICHARD D. CUDAHY, Circuit Judge
Hon. JOHN L. COFFEY, Circuit Judge
Hon. HARLINGTON WOOD, JR., Senior Circuit Judge

No. 91-2670

JERRY L. ROSS,
Plaintiff-Appellee,

v.

BLACK & DECKER, INCORPORATED, a foreign corporation,
Defendant-Appellant.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division

No. 90 C 4439

George M. Marovich, Judge

[Dec. 2, 1992]

ORDER

On consideration of the petition for rehearing and suggestion for rehearing *in banc* filed in the above-entitled cause by defendant-appellant, no judge in active service

has requested a vote thereon, and all of the judges on the original panel have voted to deny a rehearing. Accordingly,

IT IS ORDERED that the aforesaid petition for rehearing be, and the same is hereby, DENIED.